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Supreme Court of the United States

OCTOBER TERM, 1967

MIDWEST TELEVISION, INC., WESTERN TELECASTERS, INC., and JACK O. GROSS, *Petitioners,*

v.

SOUTHWESTERN CABLE CO., MISSION CABLE TV, INC., PACIFIC VIDEO CABLE CO., and TRANS-VIDEO CORP., *Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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REPLY BRIEF FOR THE PETITIONERS

This brief is submitted by petitioners in response to the answering and amicus briefs filed by the CATV companies.[1]

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[1] For convenience, these briefs will be designated "Southwestern," "Mission," "Black Hills," and "Alice Cable."

I. COMMISSION AUTHORITY OVER CATV TRANSMISSION OF TELEVISION SIGNALS.

Respondents and amici make no serious attempt to dispute the major arguments of petitioners in support of FCC jurisdiction over CATV television signal transmission: CATV's status as "interstate . . . communication by wire or radio" within the meaning of the Communications Act, sections 1, 2(a), 3(a), 3(b), 47 U.S.C. §§ 151, 152(a), 153(a), 153(b) (1964); the statutory powers and judicial precedents that authorize the Commission to regulate in order to carry out its basic functions; and the radical frustration of legislative purpose and federal policy that could be wrought by unregulated CATV.[2] Instead, the opposition briefs seek affirmatively to establish CATV's immunity from any and all Commission regulation through a narrowing theory of statutory intent, supposed Commission disclaimers of authority, and recent congressional inaction.

The principal contention is that the Communications Act was designed to grant authority only over common carriers and radio,[3] thus leaving a regulatory gap for wire communi-

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[2] Southwestern does impliedly question (p. 8) the need for CATV regulation by emphasizing that San Diego has only two VHF stations. As petitioners' opening brief noted (p. 16), at the time the Commission's jurisdiction was invoked San Diego was served by five stations, including three VHF carrying all three major television networks and one independent UHF commercial station (KAAR), while two further UHF stations were authorized or applied for. When the brief was filed KAAR had temporarily suspended service (p. 15 n.20) but since then has recommenced operations with new call letters under substituted petitioner Western Telecasters, Inc. The status of petitioner Gross' construction permit is being questioned at the Commission. At the same time, a UHF educational station has become operative. Thus, San Diego is presently served by six stations, including two UHF, and has one more UHF authorized. In addition, a request has been filed for assignment of still another UHF channel, FCC Rep. No. 620, Feb. 2, 1968, in addition to one already being considered (p. 16).

[3] Mission further suggests that even as to radio, the Commission is limited to licensing stations (p. 13). As petitioners' opening brief

cation conducted by noncommon carriers such as CATV (*e.g.*, Southwestern, pp. 16-17). Petitioners' opening brief has already shown that the Communications Act is no mere compilation of prior laws and "rigidly compartmentalized" powers, *Buckeye Cablevision, Inc. v. FCC*, No. 20274 (D.C. Cir., June 30, 1967), p. 7, but was intended as a grant of "additional" powers to provide a "comprehensive scheme for the regulation of interstate communication" (pp. 29-30).

Respondents' argument rests upon the *non sequitur* that a statute must be limited to its most detailed provisions and the most concrete problems that inspired it, a view this Court has never accepted. *E.g., FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134 (1940); *National Broadcasting Co. v. United States*, 319 U.S. 190 (1943). Respondents' legislative history imposes no such dichotomy as they urge;[4] Southwestern itself concedes that a number of the detailed provisions of the Act apply to all wire and radio communication whether or not by common carriers (pp. 26-27 & n.27).

But even if the Commission's authority were limited to wire common carriers and radio (Southwestern, pp. 23-24), it would not follow that CATV falls between two stools and is exempt. For, while CATV is wire communication that the Commission has not regulated as common carrier, the systems also fall within the definition of radio communication as "instrumentalities . . . incidental" to the transmission of radio signals. Section 3(b), 47 U.S.C. § 153(b)

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notes, title III of the Act in both caption and content covers "radio," not just station licensing. Southwestern itself acknowledges (p. 23) that "title III confers broad powers upon the Commission to regulate radio transmission" and designates licensing as "the basic instrument" but not the only one.

[4] Mission's quotation (p. 15 n.7) from the House report on the Communications Act plainly does not bear out Mission's suggestion that the Act made no substantive changes over prior law. The quotation itself, in referring only to common carrier regulation, says the Act is "modifying the provisions [of the prior law] so as to provide adequately" for such regulation.

(1964). Thus, the pertinent provisions of title III of the Act, "provisions relating to radio," as well as those of title I, would continue to provide a firm foundation for the CATV rules were such pigeonholing required.

Southwestern does not answer the title III contention by claiming that CATV falls outside the definition of radio communications.[5] Rather, it argues (p. 21) that the Commission's failure to rely upon CATV's status as "radio" when the CATV rules were framed prevents that assertion now under *SEC v. Chenery Corp.*, 318 U.S. 80 (1943). *Chenery* has no application here: that CATV constitutes radio communication within the statutory definition is a strict issue of law within the province of the Court to decide. The further claim by Southwestern (p. 21) that the Commission found CATV not to be radio communication in a decision almost ten years ago not only has little if any support[6] but is irrelevant as well. See pp. 7-8 *infra*.

Several related statutory arguments pressed by the CATV systems warrant but brief response. Alice Cable argues (p. 16) that inclusion of CATV within the section 3(a) and (b) definitions of wire and radio communication confers no power because many entities are defined in the Act, such as the United States, over whom no jurisdiction is granted. The argument fails to recognize that the wire and radio definitions alone are adopted by section 2(a) to establish the coverage of the

[5] There is no basis for Southwestern's warning (pp. 21-22 n.20) that reliance on title III would preempt state and local authority over CATV franchises, rates, and the like expressly preserved for them by the FCC. Notice of Inquiry and Notice of Proposed Rulemaking, 1 F.C.C.2d 453, 466 (1965). The *Dumont* case cited by Southwestern dealt with state censorship of program content, laid down no rule of automatic preemption, and did not hold that preemption is more likely for radio communications than for wire.

[6] The somewhat ambiguous decision, CATV and TV Repeater Services, 26 F.C.C. 403, 427-29 (1959), so far as it is relevant to this point, concluded only that CATV systems were not themselves engaged in broadcasting, a view the Commission has not sought to alter (A. 8).

Communications Act. 47 U.S.C. § 2(a) (1964). See also section 1, 47 U.S.C. § 151 (1964). Another brief, recognizing that section 2(a) implements these critical definitions, says that it simply applies to wire and radio communications whatever other provisions the remainder of the Act makes applicable to them (Southwestern, p. 25). But it is the very heart of petitioners' argument in its opening brief (pp. 26-27, 31-33) that there are important "other provisions" which securely support the authority claimed. *E.g.*, sections 4(i), 303(h), 307(b), 47 U.S.C. §§ 154(i), 303(h), 307(b) (1964).

Next, the legislative history of the Act is invoked to show that press associations, and therefore their own and other noncommon carrier wire systems, were not to be regulated (Southwestern, p. 28). The very legislative history quoted shows that press association wires were excluded, not from the Act, but simply from section 3(h)'s definition of "common carriers," 47 U.S.C. § 153(h) (1964), upon whom a range of specific and onerous duties are imposed under title II. Finally, Southwestern (p. 24 n.25) suggests that even if CATV systems engaged in interstate communication by wire, they may come within the letter or spirit of section 2(b), which carves out an exception from the Act for "carriers" located solely in one state. 47 U.S.C. § 152(b) (1964).[7] This exception, however, refers only to "common carriers" – the meaning of "carrier" under section 3(h), 47 U.S.C. § 153(h) (1964) – the one class of wire and radio communication to which both the Commission and respondents agree CATV should not belong.

The CATV briefs muster a train of entities which they assert by law or reason to be outside FCC jurisdiction but might inconsistently fall within the authority now established

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[7]This reliance upon section 2(b), which leaves such carriers to state jurisdiction, must be contrasted with the persistent efforts of CATV systems when in state forums to contest any such jurisdiction on grounds of federal preemption. See petitioners' opening brief, pp. 23-24.

over CATV. Almost all these entities, even assuming an adverse impact on radio and television similar to CATV's, are immediately distinguishable because they do not constitute wire or radio communication. Failing this threshold test, which CATV meets, are such extreme examples as television viewers (Mission, p. 22), newspapers (Mission, p. 54), and theatres (Mission, p. 55). Also outside the statutory definition are networks (Southwestern, p. 29), which arrange for programs like any other packager and use transmissions like the public generally but do not themselves transmit,[8] and television sets (Alice Cable, p. 18), which are purely reception devices quite different from CATV apparatus (see petitioners' opening brief, p. 24).[9]

Of all the suggestions only the noncommon carrier wire services sometimes used by press associations, railroads, other utilities (Southwestern, p. 31) and—largely in the future—subscription television (Black Hills, pp. 21-22) might meet the initial requirement of interstate wire or radio communications. There remain significant distinctions such as the fact that these entities do not extend the range of television signals: See sections 303(h), 307(b), 47 U.S.C. §§ 303(h), 307(b) (1964). Nor do respondents adduce authorities that

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[8]The FCC has long regulated networks indirectly under section 303(i), 47 U.S.C. § 303(i) (1964), through its so-called chain broadcast rules which are addressed to the stations affiliated with the networks. National Broadcasting Co. v. United States, 319 U.S. 190 (1943). The Commission has recently attempted to assert jurisdiction directly with respect to television networks based on the notion that the companies owning the networks are also the licensees of television stations, but this question has not been resolved.

[9]The Commission's power to require that new television sets be able to receive all allocated channels derives directly from the amendatory all-channel receiver law, 76 Stat. 150 (1962), and does not depend on the scope of "wire or radio communications" or the other provisions of the original Communications Act.

would bar limited regulation of such noncommon carrier wire services should it some day prove necessary.[10]

The last group of CATV arguments allege CATV regulation to be barred by a former decision of the Commission and its unheeded requests to the Congress for CATV legislation. The key decision cited, *CATV and TV Repeater Services*, 26 F.C.C. 403, 428-29 (1959) (*e.g.*, Southwestern, p. 3), considered several proposed bases for jurisdiction over CATV and rejected some.[11] Yet not only was there no complete disavowal of authority but the Commission expressly reserved decision on whether jurisdiction might rest on sections 1, 303 and 307(b), 47 U.S.C. §§ 151, 303, 307(b) (1964), and the impact of CATV on television allocation, observing that no findings had been made of substantial adverse impact. 26 F.C.C. at 430-31.[12]

However read, *Repeater Services* would not represent a longstanding, contemporaneous agency interpretation, to which this Court has on occasion given "weight." 1 Davis, Administrative Law § 5.06 (1958). *Repeater Services* came twenty-five years after the statute's enactment, was significantly eroded three years later, see n.11 *supra*, and suc-

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[10]The Commission has in fact reserved judgment on possible regulation of subscription wire-television. See In re Amendment of Part 73, 10 P & F Radio Reg. 2d 16-17, ¶ 312 (1967).

[11]The Commission separately concluded that in licensing microwave stations, it should not take account of the harmful impact on television of the CATV signals that might be carried. 26 F.C.C. at 431-32. This decision, relating solely to microwave, was promptly discarded by the Commission. Carter Mountain Transmission Corp., 32 F.C.C. 459, 465 (1962), aff'd, 321 F.2d 359 (D.C. Cir.), cert. denied, 375 U.S. 951 (1963).

[12]Mission's citation of the District Court's *KUTV, Inc.*, decision (p. 26 n.15) does not argue a different reading of the Commission's opinion. The first paragraph quoted by Mission concerns only the coverage of the "broadcaster" definition, and the second is true in the limited sense that in 1959 the Commission had not asserted jurisdiction because the requisite impact had not been determined.

cumbed completely two years after that when the Commission asserted jurisdiction by order and notice in 1965 (petitioners' opening brief, pp. 8-9). And, of course, even the firmest agency position can be changed if it is wrong (*id.* at 31 n.38).

As to the Commission's requests to the Congress for CATV legislation, an agency's desire for a clearer mandate and legislative guidance cannot fairly argue a present lack of authority (see petitioner's opening brief, p. 31). In point of fact the Commission reiterated its request to the Congress at the very time it issued the CATV rules (A. 63-64). Similarly, congressional failure to provide legislation can be due to any number of reasons and by itself allows no inference as to existing law. *E.g., FTC v. Dean Foods Co.*, 384 U.S. 597 (1966).[13] And the Congress' failure to act since the Second Report and Order asserted authority over CATV speaks at least as loudly for the Commission as its prior silence could against it.

II. THE COMMISSION'S POWER TO STAY CATV EXPANSION PENDING A PLENARY HEARING ON THE PUBLIC INTEREST.

Assuming *arguendo* the Commission's jurisdiction over CATV television signal transmission, the CATV systems do not attempt to refute the crucial importance, affirmed by the Commission (A. 57-60) and amplified in petitioners' opening brief (pp. 41-44), of interim relief to the success of CATV rules and the statutory public-interest goals that they serve.[14] Since temporary relief is thus patently "necessary"

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[13] United States v. Leslie Salt Co., 350 U.S. 383 (1956), cited by Southwestern (p. 39) on the importance of congressional inaction had nothing to do with requests for legislation but concerned an express administrative position left undisturbed by the Congress for over a quarter century.

[14] Southwestern does, in the context of another argument, briefly assert that the Commission could allow entrenchment during a hearing and order a subsequent cutback of CATV service (p. 61). The CATV companies, which would oppose an ordered retrenchment even

to the Commission's functions and nowhere expressly forbidden, and since section 4(i) of the Act confers power to issue rules and orders not inconsistent with the Act which meet this test of necessity, 47 U.S.C. § 154(i) (1964), respondents and amici are once again forced to prove that general language does not mean what it seems to say.

The most direct attempt to answer section 4(i) is Southwestern's claim that it does not cover the present order because it and section 303(r) were "basically enabling provisions intended to implement specific provisions" of the Act (p. 45). The interim order, like the CATV rules generally, is in fact grounded firmly in a number of "specific provisions" of the Act, notably sections 1, 303(h), and 307(b), 47 U.S.C. §§ 151, 303(h), 307(b) (1964). See petitioners' opening brief, pp. 26-27, 31-32 & n.32. Only by limiting section 4 (i) to trivia or virtual redundancy, which Southwestern's illustration shows to be its real intent,[15] can the section be removed as a basis for the order.

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more vigorously than limits on expansion, *cf.* p. 14 *infra*, may blithely ignore the difficulties in this course; but the Commission must consider among other matters (1) the harm that can be done by expanded CATV to existing local stations during the lengthy hearing period, which CATV companies are adept at prolonging, see n.24 *infra*, (2) the discouragement of new stations during the same period, (3) the permanent alteration in viewing habits that may result from expansion, (4) the financial investment and settled expectations of viewers who wire their homes and remove their outside antennas, and (5) the congressional policy in the Communications Act of determining important questions "before consequences possibly adverse to the public interest develop" (A. 57-58). See petitioners' opening brief, pp. 41-42.

[15] As its prime example of an appropriate use for section 4(i), Southwestern tenders (p. 45) the network or "chain" broadcasting rules upheld in National Broadcasting Co. v. United States, 319 U.S. 190 (1943). Given the precise "authority to make special regulations applicable to radio stations engaged in chain broadcasting" pursuant to section 303(i), 47 U.S.C. § 303(i) (1964), reliance upon section 4 (i) would be redundant.

Additionally, *United States v. Storer Broadcasting Co.*, 351 U.S. 192 (1956), squarely affirms that the general power to make rules and orders is more than an adjunct to specific provisions. Expressly quoting sections 4(i), 303(f) and 303 (r), 47 U.S.C. §§ 154(i), 303(f), 303(r) (1964), the Court upheld the Commission's rules limiting multiple ownership of stations, a subject nowhere specifically covered by the Act.[16] A line of other cases construing language akin to or even less broad than section 4(i) in other regulatory statutes confirms it to be a significant grant of authority, *e.g.*, *American Trucking Ass'ns v. United States*, 344 U.S. 298 (1953); *Niagara Mohawk Power Corp. v. FPC*, 379 F.2d 153 (D.C. Cir. 1967), which is no less the understanding of the Congress. See S. Rep. No. 860, 87th Cong., 1st Sess. 20 (1961), quoted in *Pacific Coast European Conf. v. FMC*, 376 F.2d 785, 787 n.2 (D.C. Cir. 1967).

The next general attack on the interim order (*e.g.*, Mission, pp. 54-57) is drawn from section 312(b) of the Act, 47 U.S.C. § 312(b) (1964). Respondents' silence concedes that the interim order does not violate the express terms of that section which deals only with orders directed against violations of statute, rule, or license. Instead, the argument rests upon an inference that section 312(b) must provide the sole "injunctive power" available to the Commission else the section would have been unnecessary since the same result could have been accomplished under sections 4 (i) and 303(r).[17]

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[16] Southwestern (p. 46 n.56) would like to rest the *Storer* decision on section 313 of the Act, 47 U.S.C. § 313 (1964). That section, which simply makes the antitrust laws generally applicable to radio and provides for license revocation or denial for violators, was not relied upon by the Supreme Court.

[17] Southwestern also argues that the Congress' failure to amend section 312(b) to provide for judicial stays pending such proceedings points to a lack of power under sections 4(i) and 303(r). Congressional inaction allows no such inference (see petitioners' opening brief, p. 31), not to speak of the differences between such stays and the order here. See, *e.g.*, n.21 *infra*.

Passing the erroneous assumption that the Congress grants power only in the clear absence of existing authority and never to remove uncertainty or guide the agency's approach,[18] there are ample reasons for the enactment of section 312(b) even though section 4(i) supports the order here. The adjudication under section 312(b) of violations of statute, rule or license terms is a function the Congress could understandably resolve to spell out in detail and hedge with stringent safeguards, involving as it does both condemnation and the permanent prohibition of existing conduct. And the Communications Act is replete with court sanctions for such violations, *e.g.*, sections 401(a), 501-04, 47 U.S.C. §§ 401(a), 501-04 (1964), whose presence to deal with violations might itself have raised doubts whether Commission action was "necessary" had it sought to enjoin violations under section 4(i) in the absence of section 312 (b). In all events, the practice of granting agencies express power to adjudge and halt violations is so widespread, as Southwestern's brief demonstrates (App. E), that failure to do so might raise serious doubts of agency competence.[19]

By contrast, the interim order in this case is a temporary measure demonstrably necessary to carrying out a broad-gauged inquiry into the public interest requirements of the

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[18] Compare United States v. du Pont & Co., 353 U.S. 586 (1957) (holding section 7 of the Clayton Act applied to vertical mergers even prior to explicit amendment); O'Brien v. United States, 376 F.2d 538 (1st Cir.), cert. granted, 389 U.S. 814 (1967) (No. 232) (draft card burning statute providing same penalty for conduct already covered by existing law).

[19] The statutes of other agencies in Southwestern's compilation *all* appear to deal with the adjudication of violations (pp. E-2 to E-3). Thus, even to the limited extent disparate regulatory schemes can be compared, the compilation merely reiterates the section 312(b) argument and constitutes no proof that all grants of "injunctive" power must be similarly couched. The compilation contrasts sharply with Mission's argument, in another context, that federal agency statutes cannot be compared at all (pp. 59-62).

San Diego market.[20] It is quite unlike a section 312(b) decision whether a specific violation has occurred, which can normally be reached swiftly or without need of interim relief.[21] As petitioners' opening brief noted (p. 38), the Commission could easily have accomplished the same temporary stay of CATV expansion by a general rule covering all systems,[22] a rule which would have the same "injunctive" impact as the present order yet stand beyond even the slender inference arguments based upon section 312(b).

In choosing to proceed by particularized orders in a class of CATV cases deemed by it less suited to general rules, the Commission has exercised a normal agency prerogative. See *SEC v. Chenery Corp.*, 332 U.S. 194, 202 (1947). It is in no way "incredible" (Southwestern, p. 51) to specify different procedures for different CATV problems, differentiating by type of signal and market rank, even though a single company may present a number of problems and be subject to more than one procedure.[23] And, quite obviously, to

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[20] Rejecting claims that another order to a CATV company under 47 C.F.R. § 74.1109 (1967) conflicted with section 312, the First Circuit stated: "[W]e agree with the Commission that the proceeding shaped a rule to govern petitioners future operations; it did not try to stop violations of a license, statute, or past rule. A cease-and-desist order was not warranted and was not sought." Presque Isle TV Co. v. United States, No. 6896 (Dec. 18, 1967), pp. 7-8 n.6.

[21] The normal brevity of a section 312(b) proceeding is one reason why the Congress might reasonably fail to authorize the Commission to seek interim injunctions pending completion. Compare Southwestern, p. 49.

[22] Southwestern seeks to escape the force of this point by stating (pp. 57-59) that the facts would not have supported a general rule halting all CATV expansion. If that is the sole alternative left to the Commission, the facts would require it and they would certainly justify such a ban in "overlapping market" cases such as the present one.

[23] The *Buckeye* litigation, obscurely described by Southwestern (pp. 50-51), is illustrative. Of the nine signals carried in Toledo, Ohio, by Buckeye, one from Lansing, Michigan, was a distant signal flatly prohibited by the CATV rules, unless a waiver is first obtained. This

explain such distinctions in regulating CATV is not to argue, as Mission suggests we do (pp. 58-59), that the Commission has "greater enforcement powers with respect to CATV regulation than it has with respect to radio regulation."

In further criticism of the interim order, Southwestern (p. 60) has inadvisedly chosen to emphasize its duration, arguing that "no federal court would have imposed a restraining order of such unusual duration without an evidentiary hearing and oral argument." The interim order has remained in force so long because respondents have sought repeatedly to delay the hearing on a final order to replace the interim measure.[24] Moreover, the interim order was no "ex parte"

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importation, established in a section 312(b) proceeding, warranted a cease-and-desist order as to the Lansing signal without more ado, and Buckeye's subsequent attack on the order was rejected in Buckeye Cablevision, Inc. v. FCC, No. 20274 (D.C. Cir., June 30, 1967). In the second episode, local stations petitioned the Commission to use its reserved power under 47 C.F.R. § 1109 (1967) to halt Buckeye's importation of otherwise permissible Grade B signals from Detroit, Michigan, and Windsor, Ontario, because of adverse effects upon the public interest. Those signals presented the same "overlapping markets" danger as the instant case (see A. 62 n.69), and the Commission set the request down for a full-scale hearing on the public-interest question, granting interim relief against expanded importation of Detroit-Windsor signals as in the order attacked here. In re Buckeye Cablevision, Inc., 10 F.C.C.2d 745 (1967).

[24] Simply to choose examples, the CATV companies:

(1) appealed from an interlocutory order requiring evidence be taken on an exhibit and obtained a suspension of the hearing for two months until their appeal was rejected, Joint Application for Review, Petition for Stay, both filed April 26, 1967, FCC Docket No. 16786;

(2) twice sought to terminate or halt the Commission inquiry pending final disposition of this case, efforts which were unsuccessful but enabled respondents to postpone the hearing dates again, Petition to Deny and Other Relief, filed May 10, 1967; Tr. 3352, FCC Docket No. 16786; and

(3) effected a further delay by opposing submission of proposed findings on most issues and evidence on the date fixed by the hearing examiner on the ground that a further hearing on one exhibit was to be held, Tr. 3358, 3360-62, FCC Docket No. 16786.

measure as Southwestern alleges (p. 52), but issued upon ample notice and after the submission of manifold pleadings and written evidence by the CATV companies (A. 147). Nor have respondents sought to controvert the showing in petitioners' opening brief (pp. 52-53) that under the applicable standards the undisputed facts called for a halt on expansion.[25]

The related suggestion that a court would not issue an injunction without stronger proof of probable harm (Southwestern, p. 60) is yet more inapt. Not only could the Commission certainly anticipate "irreparable injury" in a number of forms, see n.14 *supra*, but the case for interim relief was far stronger than in the normal civil action. The dispute here is not between two private parties but weighs the claims of several commercial enterprises against the public interest of many thousands of citizens. See, *e.g.*, *R. A. Holman & Co. v. SEC*, 299 F.2d 127, 132 (D.C. Cir.), *cert. denied*, 370 U.S. 911 (1962); *Virginia Petroleum Jobbers Ass'n v. FPC*, 259 F.2d 921, 927 (D.C. Cir. 1958). Nor did the Commission interfere with existing operations but rather imposed limited restrictions on further expansion of the systems pending a hearing. Any suggestion that the Commission's CATV restrictions took Southwestern by surprise (p. 9 n.10) is unwarranted, for the Commission warned of its intention to regulate months before the system even began to lay lines, let alone to commence operations.[26]

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[25] Even assuming a court might have allowed further evidence or oral argument under its particular practice, the CATV companies give no reason or authority which would confine an administrative agency to precisely the same course. See 1 Davis, Administrative Law § 8.03 (1958).

[26] The Commission gave its warning in April 1965 in explicit terms. Notice of Inquiry and Notice of Proposed Rulemaking 1 F.C.C.2d 453, 477. Construction started after that date, Southwestern Exs., Nos. 2-3, FCC Docket No. 16786, and Southwestern began service in December 1965 (Southwestern, p. 9). Mission began some service prior to April 1965 but laid by far most of its cable and acquired most of its subscribers afterwards. Initial Decision, 11 P & F Radio Reg. 2d 273, 277-80 (1967).

An even more direct appeal to the equities of the stay order – and hence to an issue not now before the Court, see p. 17 *infra* – is Southwestern's stress upon the examiner's findings after the plenary hearing that permanent outside signal restrictions ought not be imposed. The argument ignores, of course, the examiner's conclusion that other restrictions would be needed to protect local television. Initial Decision, 11 P & F Radio Reg. 2d 273, 304 (1967). It also fails to note that the Commission staff has concluded that the examiner's report is seriously flawed and that the Commission, which has the report under review, has suggested its own doubts.[27] The argument's basic error, however, is its attempt to show a lack of power through an ex post facto suggestion that it was poorly exercised. It would be at least as legitimate for petitioners to affirm the keenness of the Commission's weighing of equities by noting that Southwestern, the weakest of the CATV systems, has steadily improved its financial position despite the limited stay.[28]

Lastly, in opposition to the temporary stay Southwestern presses several authorities. The only court decisions are *Trans-Pacific* and *Standard Airlines* (pp. 53-54), both distinguished by petitioners' opening brief on a number of grounds (pp. 47-48). Southwestern also quotes from Professor Jaffe (p. 44), who states that absent a "statutory grant" it does not "appear" that an agency may issue interim stays. Citation of this statement begs the very question whether power to issue "necessary orders" under section 4(i), which is not a

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[27]Noting, *inter alia*, that the FCC Broadcast Bureau "states that the examiner's decision contains many material errors of fact and law," which led to an incorrect ultimate result, the Commission quite properly declined to terminate the temporary stay until it had passed upon the examiner's report. Memorandum Opinion and Order, 11 P & F Radio Reg. 2d 721, 724 (1967).

[28]Memorandum Opinion and Order, 11 P & F Radio Reg. 2d 721, 725 (1967). Mission, the largest local CATV operation in the country, obviously has no complaint on this score.

standard piece of agency equipment,[29] constitutes a sufficient grant. In addition, Professor Jaffe's appraisal rests on an examination of only one case, *Trans-Pacific*, where the agency involved did not possess the "necessary orders" power.

Southwestern finally proffers a quotation from Professor Gellhorn cautioning against promiscuous use of summary interim determinations (p. 44 n.53). The caution follows a discussion of instances in which such provisional remedies have been sanctioned, Gellhorn & Byse, Administrative Law 769-74 (1960), while the unquoted remainder of the quoted paragraph urges that an opportunity be given to show "there is no good reason" for the stay, *id.* at 774—an opportunity fully afforded to respondents (petitioners' opening brief, pp. 49-50.

A final point bears emphasis in concluding this discussion: the temporary stay power fulfills the function, vital to CATV regulation at large, of preventing irreversible harm while evaluation is under way. Whether by rule or order, the entire regime of CATV regulation proceeds upon this premise (see petitioners' opening brief, pp. 14-15, 42-43). Indeed, the premise runs throughout the Communications Act itself (A. 57-58). This Court could have been addressing itself directly to CATV and the regulatory scheme applied by the FCC when it spoke of "the rapidly fluctuating factors characteristic of the evolution of broadcasting" and the "corresponding requirement that the administrative process possess sufficient flexibility to adjust itself to these factors." *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 138 (1940).

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[29] It is not, for example, possessed by the Federal Trade Commission, *cf.* 15 U.S.C. § 74 (1964), the Securities & Exchange Commission, *cf.* 15 U.S.C. § 78w (1964), the Federal Maritime Commission, *cf.* 46 U.S.C. § 1114(b)(1964), the Atomic Energy Commission, *cf.* 42 U.S.C. § 2201(p) (1964), or the National Labor Relations Board, *cf.* 29 U.S.C. § 156 (1964), to speak only of the independent agencies and not of the departments.

III. ADDITIONAL CONTENTIONS RAISED BY THE RESPONDENTS AND THE AMICI.

In addition to their discussions of the jurisdictional and interim order questions, the opposing briefs – especially those of the amici curiae – seek at this late stage to interject other issues into these proceedings. These include allegations that the Communications Act as applied here and 47 C.F.R. § 74.1109 (1967) are unconstitutionally vague; that the CATV rules generally conflict with established federal policy favoring competition; and that the restrictions on CATV constitute an illegal licensing arrangement.

None of these issues is before this Court. The questions presented in our petition for certiorari (p. 2) and that of the United States and the Commission (p. 2) in No. 363 have been rephrased by respondents (Southwestern, p. 1; Mission, p. 2) and one amicus (Alice Cable, p. 2) but not altered in substance.[30] The additional questions now pressed by the CATV companies are not coincident with the questions presented nor is any a "subsidiary question fairly comprised therein," Sup. Ct. R. 40(1)(d)(1), and therefore cannot be raised by any party. Sup. Ct. R. 40(1)(d)(2), 40(3), 42(5).[31] Without abandoning our objection to their untimely appearance, a brief precautionary response on these issues will nevertheless be made.

Southwestern alone advances the claim that, as construed by the Commission and petitioners, the Communications Act is unconstitutionally vague for failure to specify standards for regulating CATV systems (pp. 34-37). The argument, which Southwestern did not consider worth raising in

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[30] The other amicus, Black Hills, has simply omitted the questions presented, thus relying on those of the parties as is permitted by Sup. Ct. R. 42(5).

[31] Indeed, if is not clear, in light of section 405 of the Communications Act, 47 U.S.C. § 405 (1964), limiting judicial review to points raised before the agency either initially or by rehearing petition, which of the added questions if any could have been brought into court.

the Court of Appeals, would have little enough merit even if the Commission had asserted plenary authority under the Act's public interest standard to grant franchises and govern CATV rates, the number of systems in an area, withdrawal of service, and like matters. The course of decisions today allows the widest latitude for administrative action[32] and cannot be overcome by citation of two 1935 cases striking down New Deal legislation (Southwestern, p. 36).[33]

In all events, the Commission has only sought to regulate CATV systems to limited extent needed to meet the goals and standards expressly set forth in sections 1, 303(h), and 307(b) of the Act, 47 U.S.C. §§ 151, 303(h), 307(b) (1964), and the congressional policy reflected in the amendatory all-channel receiver law, 76 Stat. 150 (1962), aiming at viable local UHF television. Petitioners' opening brief spells out in detail the way in which these statutory provisions not only permit but virtually compel the measures taken by the Commission (pp. 22-37, 40-44).

The claim that 47 C.F.R. § 74.1109 (1967) is itself unconstitutionally vague is made by Black Hills, which contends this reserved power to waive or alter the other CATV rules in appropriate cases is an "administrative monstrosity" and renders the whole scheme meaningless (pp. 37-42). Not surprisingly, no authority is offered for this position since *United States v. Storer Broadcasting Co.*, 351 U.S. 192 (1956), upheld the Commission's multiple ownership rules

[32] *E.g.*, Carlson v. Landon, 342 U.S. 524 (1952); American Power & Light Co. v. SEC, 329 U.S. 90 (1946); Fahey v. Mallonee, 332 U.S. 245 (1947); Arizona v. California, 373 U.S. 546 (1963).

[33] Of the two cases cited – Panama Ref. Co. v. Ryan, 293 U.S. 388 (1935), and Schecter Poultry Corp. v. United States, 295 U.S. 495 (1935) – Professor Davis says: "These two cases are the only ones invalidating congressional delegations to governmental authorities. The Panama case, except in its own unique setting, is of questionable authority today . . . . The Schecter case involved the most sweeping congressional delegation of all times." 1 Davis, Administrative Law § 2.06, at 99-100 (1958) (footnotes omitted).

precisely *because* they included a general waiver provision for cases outside the run of the mill.

Far from authorizing arbitrary action, 47 C.F.R. § 74.1109 (1967) is employed, as the Commission's decision in this case shows (A. 161-63), in accord with the basic standards explicit throughout the CATV rules and the Second Report and Order. In essence, CATV is under no circumstances prohibited but rather its importation of outside signals is regulated and even such importation is permitted save in instances where it would infringe on the establishment and healthy development of local television broadcasting. *E.g.*, A. 52, 57; 47 C.F.R. §§ 74.1107(a), (d) (1967). Any exercise of the reserved power can be challenged in court if it does not conform to these standards. The aim, in short, is not to evade standards but on the contrary to approach them more closely in the odd cases that do not fit rules framed for the average situation.

Mission urges that the CATV rules are inconsistent with the "national policy in favor of competition" (p. 36). To describe the appropriation of another's programs without consent as "competition" is a curious use of the phrase even on the open market.[34] In the regulated realm of interstate wire and radio communication, the cases make it clear beyond debate that the Commission may take full account of economic impact in carrying out the aims of the statute and pursuing the public interest. *E.g., FCC v. Sanders Radio Station*, 309 U.S. 470 (1940); *FCC v. RCA Communications, Inc.*, 346 U.S. 86 (1953); *Carroll Broadcasting Co. v. FCC*, 258 F.2d 440 (D.C. Cir. 1958).

The *Sanders* case, cursorily described by Mission (p. 40 n.18), held that "resulting economic injury to a rival station

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[34] Not only is this practice forbidden to other radio stations by the express language of section 325 of the Act, 47 U.S.C. § 325 (1964), but it seriously impairs the legitimate acquisition by local stations of rights to make the first showing of a film or series in the area (A. 54-55).

is not, in and of itself, and apart from considerations of public convenience, interest, or necessity, an element the [Commission] must weigh" in passing on license applications, 309 U.S. at 473, explicitly noting that the Commission could certainly consider "competition" in the public interest context. *Id.* at 475-76. Other decisions on which Mission relies (pp. 36, 38, 44, 50) have nothing to do with the factors the FCC may weigh but concern the claims of various regulated industries that they are thereby exempt from the further regulation of the antitrust laws.[35]

Finally, Black Hills advances the view that the CATV rules at large comprise an illegal "licensing" scheme (pp. 33-38). The CATV rules do not "license" within the meaning of the Act, section 3(c), 47 U.S.C. § 153(c) (1964), and the Commission does not pass on the eligibility of system operators or otherwise grant or approve the transfer of operating authority of systems, as it does with radio station licensees. See, *e.g.*, *Akron Telerama, Inc.*, 7 F.C.C.2d 809, 815 (1967). Franchising is left to state and local authorities, see n.5 *supra*, and permission under the CATV rules to import outside signals is most truly akin to allocation of a television channel to a city under the table of assignments, a proceeding not deemed to be licensing. See, *e.g.*, *Transcontinent TV Corp. v. FCC*, 308 F.2d 339 (D.C. Cir. 1962).

But however the rules may be characterized for one purpose or another, Black Hills offers nothing new to show their illegality.[36] Whether or not the rules fall within the

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[35] Other general references to show that not all aspects of radio are regulated and that the Commission is not the guarantor of individual stations (pp. 38-39, 41) are equally correct and equally irrelevant.

[36] Black Hills does argue (p. 36) that the CATV rules do not follow the "license" revocation procedures of section 312(a), 47 U.S.C. § 312 (a) (1964). That section explicitly concerns itself with "station licenses" and, as noted, CATV systems are not station licensees or regulated as such under title III of the Act. Additionally, the Commission has never authorized in any fashion the expanded CATV operations which are the subject of the temporary stay in this case.

licensing definition of the Administrative Procedure Act (p. 34), there is not even a suggestion in the brief that that statute's licensing requirements have been violated. Nor would Black Hills have been any happier had the Commission imposed a blanket ban on outside signal importation, a restraint no one could characterize as licensing at all. The bulk of the licensing argument in fact turns out to be the respondents' own well-worn contention, now dressed up in rhetoric about licensing, that the Communications Act does not extend to CATV.

CONCLUSION

For the reasons stated in this reply and in petitioners' opening brief, the decision below should be reversed.

Respectfully submitted,

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